

**Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580**

In the Matter of:)	
)	Project No. R411008
CAN-SPAM Act Rulemaking)	
)	

COMMENTS OF ACUTA

ACUTA, Inc.: The Association for Communications Technology Professionals in Higher Education (“ACUTA”) respectfully submits these comments in response to the Federal Trade Commission’s (“FTC” or “Commission”) Notice of Proposed Rulemaking addressing *Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act*.¹

ACUTA supports the Commission’s efforts to revisit and perfect its rules implementing the CAN-SPAM Act, and urges the FTC to: (1) clarify that all email messages sent by educational institutions/not-for-profit organizations are not “commercial” under the CAN-SPAM Act; (2) maintain, if not lengthen, the time interval in which email senders are required to honor and process opt-out requests; and (3) ensure that adequate protections are in place prior to permitting Post Office boxes to qualify as a valid physical address under CAN-SPAM.

¹ ACUTA is a non-profit association whose members include over 800 institutions of higher education within the United States. ACUTA members include both large and small non-profit institutions of higher education, ranging from institutions with several hundred students to major research and teaching institutions with greater than 25,000 students. ACUTA member representatives are responsible for managing voice, data and video communications technology services for students, faculty and staff on college and university campuses.

The FTC Should Revisit the Classification of Email Messages Sent by Educational Institutions/Not-For-Profit Organizations

The Commission should take this opportunity to review its CAN-SPAM categories to clarify that *all* email messages from “non-profit organizations” and not-for-profit “educational institutions” are not “commercial” under the CAN-SPAM Act. *See Notice* at 47-8. It is undisputed that the vast majority of email messages from ACUTA member institutions clearly fall outside the definition of “commercial,” and are thus beyond the scope of the CAN-SPAM Act. Nevertheless, there may be specific departments and offices within colleges and universities that could send messages that fit within the FTC’s definition of “commercial.” This possibility requires ACUTA member institutions to evaluate their practices and set up costly and resource-intensive procedures to comply with CAN-SPAM for that small subset of potential activities.

The CAN-SPAM Act is designed to curb the “extremely rapid growth in the volume of unsolicited commercial electronic mail,” including those messages that contain “vulgar or pornographic” content. *CAN-SPAM Act*, § 2(a). There is no evidence that colleges and universities are responsible for inappropriate email messages or the rapid increase in unsolicited email messages. The CAN-SPAM Act imposed limitations on commercial entities; Congress did not intend to impose costs on not-for-profit organizations and educational institutions that have no nexus to the identified problem. All email messages from ACUTA member institutions should qualify as non-commercial under CAN-SPAM.²

² If a not-for-profit or educational institution were to abuse its non-commercial status under CAN-SPAM, the FTC could consider targeted action against that organization. The FTC, however, should refrain from imposing significant compliance costs on all not-for-profit and educational institutions.

The Commission Should Maintain, if Not Lengthen, the Opt-Out Time Interval

Absent a re-classification that all email messages from not-for-profit organizations and educational institutions are non-commercial, a longer opt-out period may be appropriate to reflect the institutional administrative costs of compliance for these entities and the unlikelihood of any misconduct on the part of these institutions. Further, the FTC should reject any proposal to reduce the number of days in which senders of email are required to honor and process an opt-out request from ten days to three days. *Notice* at 61-70.

Proponents of shortening the time interval contend that the current ten days is “unnecessarily generous,” yet fail to provide any tangible evidence that the current interval harms or adversely affects recipients, referencing only a potential and unlikely harm – “mail-bomb[ing]” recipients during the opt-out period. *Notice* at 67.

ACUTA shares the concerns of the NetCoalition and others that the need for coordination and synchronization of multiple databases and manual processes advises against a reduction in the opt-out time interval. *Notice* at 63. In fact, these complications facing many institutions strongly suggest the need to consider expanding the time frame from ten days to a longer interval (*i.e.*, proposals to expand the opt-out period to thirty-one days). *Notice* at 64. The ability of each department and office within institutions of higher learning to coordinate all necessary activities within a three day period is often infeasible. Because most colleges and universities are highly decentralized, unlike many commercial organizations, the central IT department may have little control over how quickly a remote department might respond to such a request.

For example, one institution reports that the proposed change could affect the University Foundation, the Alumni association, Athletic department, Performing Arts venues, and a K-12 Laboratory School that operates within the university, all of which may send-out "commercial" emails under the Commission's current definition.

In each instance, at this institution, there is a manual effort in removing email addresses upon an opt-out request from an email recipient, which may be either a single-step process (if the list is on a department's server) or a two-step process (if there is also some type of action which must be taken regarding the university's central email server). In either the single-step or two-step process, a single employee administers the central email function. Importantly, this is only a single component of the employee's many responsibilities, because even an institution with over 12,500 students cannot financially support a dedicated email database manager. A tighter opt-out time frame sets up a scenario for unintended compliance failure due to office absences, vacations, illness or other emergency situations affecting the single responsible employee.

Another institution with over 17,000 students shares many of the same challenges and suggests that ten days is the minimum processing time for an opt-out request due to 1) scarce resources (juggling many duties); 2) decentralized environment (they would need time to find out who sent the message and then contact them and ask them to remove the person); and 3) the need for manual database processing (they need to update a spreadsheet to remove the email recipient).

The proposals to reduce the opt-out time interval to three days underscore the need for the FTC to revisit the classification of not-for-profit/educational institutions. Businesses that rely upon commercial email solicitations can internalize and rationalize the costs of automating databases and procedures to comply with the law and industry demands. For instance, domain name registrar Go Daddy is able to “honor[] opt-out requests within seconds.” *Notice* at 68. This provides little insight into the length of time necessary for small business and non-commercial entities sending occasional commercial messages to comply as described in detail above. There are costs associated with automating databases and necessary functionalities, costs that cannot be justified based on the small number of commercial messages many not-for-profit and educational institutions typically send.

The FTC Should Ensure that Adequate Protections are in Place Prior to Permitting Post Office Boxes to Qualify as a Valid Physical Address

Because law enforcement must have an effective and efficient means to uncover the true identity and location of spammers, the Commission should proceed with caution with respect to the proposal to allow a “Post Office box, or private mailbox” to qualify as a “valid physical postal address” under CAN-SPAM. *See Notice* at 49-55. The *Notice* correctly raises incidents of past misuse of Post Office boxes by criminals and fraudulent companies/individuals, and underscores the FTC’s “own law enforcement experience that those who orchestrate illegal schemes typically seek to remain anonymous to law enforcement officials.” *Notice* at 52. ACUTA shares the concern of the NetCoalition that “a physical address is necessary to ‘ensur[e] that a sender can be physically located.’” *Notice* at 51.

In response, the *Notice* suggests that “the regulations of the United States Postal Service require verification of the street address of any person seeking to rent a Post Office box.” *Notice* at 52. As a practical matter, the sufficiency of such requirements is not known, and the *Notice* does not provide specific evidence that such regulations have effectively curbed the misuse of Post Office boxes. Accordingly, prior to permitting Post Office mailboxes to satisfy the valid physical postal address requirement, the FTC must assess and evaluate the relevant United States Postal Service regulations and determine if they adequately protect the interests of consumers and law enforcement for purposes of CAN-SPAM enforcement.

Conclusion

ACUTA appreciates the opportunity to participate in this proceeding, and hopes the FTC takes into consideration the unique operational issues facing not-for-profit and educational institutions with respect to the obligations of the CAN-SPAM Act.

Respectfully Submitted,

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